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SERVICE DATE – LATE RELEASE NOVEMBER 18, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34734

NORTHEAST INTERCHANGE RAILWAY, LLC
– LEASE AND OPERATION EXEMPTION –
LINE IN CROTON-ON-HUDSON, NY

STB Finance Docket No. 34735¹

GORDON REGER
– CONTINUANCE IN CONTROL EXEMPTION –
NORTHEAST INTERCHANGE RAILWAY, LLC

Decided: November 17, 2005

In STB Finance Docket No. 34734, we are rejecting the notice of exemption because the transaction is inappropriate for consideration under the class exemption procedure at 49 CFR 1150.31, which allows parties involved in routine transactions to use abbreviated summary procedures to obtain authority, subject to an after-the-fact Board review if objections are received. In STB Finance Docket No. 34735, we are rejecting, as moot, the notice of continuance-in-control exemption related to that transaction.

BACKGROUND

By notice filed on August 1, 2005, Northeast Interchange Railway, LLC (NIR), a noncarrier, invoked the summary class exemption procedures at 49 CFR 1150.31 to lease and to operate, as a common carrier by railroad, approximately 1,600 feet of track that connects with CSX Transportation, Inc. (CSXT), at approximately milepost QC 35, in Croton-on-Hudson, NY. The track is owned by Greentree Realty, Inc. (Greentree), a noncarrier, and is under lease to Metro Enviro Transfer, LLC (Metro), a wholly owned subsidiary of Allied Waste North America, Inc. (Allied). NIR has reached an agreement to acquire Metro from Allied, including Metro's rights under its lease with Greentree. Under the class exemption procedures, the exemption was due to go into effect on August 8, 2005.

¹ These proceedings are not consolidated but are being considered in the same decision for administrative convenience.

In its notice filing, NIR states that it plans to initially provide rail transportation service for the transloading of construction and demolition waste and other materials over the 1,600 feet of track. The firm plans to install, at an unspecified date, additional trackage on the property to serve other traffic, such as intermodal, lumber, brick, road salt, steel, and bulk liquid shipments. NIR expects to enter into an interchange agreement with CSXT for the interchange of traffic.

NIR asserts that the trackage was constructed “in approximately 1997” and has been used by Metro to switch cars to and from track owned by CSXT at milepost QC 35. According to NIR, Metro has been transloading construction and demolition debris at the site from trucks to rail cars for shipment by railroad to disposal sites and has operated under license from the New York State Department of Environmental Conservation (NYSDEC). The town of Croton-on-Hudson, however, has declined to renew a zoning permit for such use, and the town’s position has been upheld by the New York Court of Appeals. According to NIR, the town has ordered Metro to discontinue its transloading of construction and demolition waste. By supplement filed on August 4, 2005, NIR states that it intends to transfer the Metro license issued by NYSDEC to NIR and that it intends “to operate the facility in full compliance with the license and other applicable regulations of NYSDEC notwithstanding the fact that the license requirements and such regulations are arguably preempted by 49 U.S.C. 10501.”

NIR is wholly owned by Regus Industries, LLC, which is in turn controlled by Gordon Reger (Reger). Reger also owns a controlling interest in the New York Cross Harbor Railroad Corporation (NYCH), a Class III rail carrier. To allow his common control of NYCH and NIR if NIR becomes a licensed railroad common carrier, Reger has concurrently filed a notice of exemption in STB Finance Docket No. 34735, Gordon Reger – Continuance in Control Exemption – Northeast Interchange Railway, LLC. In that notice, Reger asserts that businesses that he controls transport various commodities by rail, including construction, demolition, and other solid wastes. That exemption was also due to go into effect, under the class exemption procedure, on August 8, 2005.

On August 4, 2005, the Village of Croton-on-Hudson (Village) filed a petition to reject the notice in STB Finance Docket No. 34734, or, alternatively, to stay its effectiveness. The Village argued that: (1) the notice is void ab initio for containing false, misleading and inadequate information; (2) the Board has no licensing authority over the track because it is exempt spur track or switching track; and (3) the activity in which NIR would be engaging is not subject to Board jurisdiction because it is not transportation by railroad, but merely continuation of the same private waste processing activities by a different entity. NIR filed a reply on August 5, 2005.

In light of the objections raised by the Village and the important issues raised by these filings, the Board, by decision served on August 5, 2005, entered a housekeeping stay of both exemptions intended to be covered by the notices, specifying that the exemptions sought under

the notices would not become effective until a further order of the Board. Not yet having seen NIR's first reply filed on August 5, the Board gave NIR until August 15, 2005, to file a reply to the Villages' petition to reject the notice in STB Finance Docket No. 34734. On August 12, 2005, NIR filed a "Supplemental Reply" pursuant to the Board's August 5, 2005 decision.

On August 15, 2005, the Village filed a "Supplementary Filing" in support of its petition filed on August 4, 2005. On August 16, 2005, the State of New York and NYSDEC filed a statement asking us to continue to stay the exemptions and to seek additional information on the planned operations.

On August 22, 2005, NIR filed a motion to strike the Village's supplemental pleading filed on August 15, 2005, arguing that the supplemental pleading is not allowed under our regulations and contains "redundant, irrelevant, impertinent and incorrect information." Also, on August 25, 2005, NIR filed a petition to supplement the record to address three letters² that were received by the agency but not served on NIR. NIR tendered copies of three letters that it sent in reply to the persons making the communications.

PRELIMINARY MATTERS

We will strike the Village's supplemental pleading filed on August 15, 2005. It is an impermissible reply to NIR's reply filed on August 12, 2005. 49 CFR 1104.13(c). The pleading has not been accompanied by a motion for its admission. Nor is it permitted by any other order of the Board. Moreover, in light of the action that we are taking in this decision, our exclusion of this pleading will not prejudice the Village. As explained below, we are rejecting NIR's notice of exemption and requiring NIR, if it wishes to pursue Board authority, to file either a petition for an individual exemption, under 49 CFR 1121, or an application under 49 CFR 1150 Subpart A. Thus, if NIR pursues Board authority in a subsequent proceeding, the Village will have the opportunity to submit information to assure development of a full factual record.

We will grant NIR's unopposed petition to supplement the record to address the three letters.

² The letters were from Congresswoman Sue Kelley, Senator Charles A. Schumer, and Westchester County Legislator Thomas Abinanti.

DISCUSSION AND CONCLUSIONS

We will reject the exemption notice filed in STB Finance Docket No. 34734 because the lease and operation transaction contemplated by NIR is not appropriate for consideration under the abbreviated class exemption procedures of 49 CFR 1150.31. Because we are rejecting this notice, we will also reject, as moot, the related notice of exemption filed in STB Finance Docket No. 34735.

As we have explained in prior cases, see, e.g., Riverview Trenton Railroad Company — Acquisition and Operation Exemption — Crown Enterprises, Inc., STB Finance Docket No. 33980, slip op. at 6-10 (STB served Feb. 15, 2002) (Riverview Trenton), the class exemption is meant to be used for routine transactions that have not attracted substantial controversy and local interest, such as transactions where new operators would be continuing an existing common carrier rail service over lines that selling carriers can no longer operate profitably. Where an individual transaction differs substantially from the type of routine matter that the class exemption was intended for, the Board may reject or revoke notices seeking to use the class exemption so that it may consider the merits of the proposal in more depth, through either a petition for exemption or an application, as in Riverview Trenton.

In STB Finance Docket No. 34734, the factual and legal issues presented in the pleadings filed to date demonstrate that NIR's proposed transaction is controversial and raises important issues that make more scrutiny and the development of a more complete record necessary. The current construction and demolition waste operation at the site has attracted substantial opposition and local interest, including litigation in which the operations of NIR's predecessor were found to be a threat to the public health by the state court. Moreover, NIR has expressed an intent to convert this previously private construction waste transfer operation into what could turn out to be a more extensive for-hire common carrier operation involving commodities in addition to construction waste. The Village cites this planned expansion in support of its argument that the operational changes that are expected would exceed the Board's thresholds for conducting an environmental review.³

The Village has asked us to examine the extent of the Board's jurisdiction over the proposed operations, and thus the extent to which state and local regulation of the handling of construction waste on the property would be preempted under 49 U.S.C. 10501(b). It notes that a non-railroad, or a railroad to the extent it is engaged in activities other than transportation, is not subject to Board jurisdiction. The Village raises concerns about the nature of the handling that the waste material would receive at the site (which, it believes, will constitute processing,

³ The Board typically does not conduct an environmental review on proposals to lease and operate an existing line unless there will be an increase in rail traffic operating over the line of at least 8 additional trains a day (3 in an air quality non-attainment area) or a 100% increase in traffic (measured in gross ton miles annually). See 49 CFR 1105.7(e)(4), (5).

rather than transloading), whether NIR would be operating as a common carrier by railroad (rather than as a private shipper of waste), and whether the transaction is private track or excepted from our licensing authority under 49 U.S.C. 10906 on the ground the track is switching or spur track. Under these circumstances, we conclude that our class exemption procedure is not appropriate for considering NIR's proposed transaction, and we will reject its notice.

Because we are rejecting NIR's notice of exemption in STB Finance Docket No. 34734, NIR will have to file either a petition for exemption under our case-by-case exemption procedures at 49 CFR part 1121, or a formal application under 49 U.S.C. 10901 and 49 CFR 1150 Subpart A, if it desires to pursue Board authority for the transaction. Any filing must include NIR's entire case-in-chief. Either the petition for exemption or the application process should allow the Board to compile a record sufficient to resolve the issues that have been raised about this proposal.

The continuance-in-control notice filed by Gordon Reger in STB Finance Docket No. 34735 is moot because it flows from the transaction underlying the notice in STB Finance Docket No. 34734, which we are rejecting. Accordingly, we will reject the notice of exemption in STB Finance Docket No. 34735 as well. Should the Board authorize the transaction at issue in STB Finance Docket No. 34734 in another proceeding, Mr. Reger may file a similar continuance-in-control notice referring to the authority obtained in that other proceeding.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 34734, the notice is rejected, and that proceeding is discontinued.
2. In STB Finance Docket No. 34735, the notice is rejected as moot, and that proceeding is discontinued.
3. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary